October 2007 Round-Up: International Tort Claims, "Forum Non" Dismissals and Punitive Damages

This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has "aided and abetted" a violation of international law, what law defines the test for "aiding and abetting." *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available here) concern the tort claims of a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over $400 billion. The basic theory of the case is that defendants' indirectly caused plaintiffs' injuries by perpetuating the apartheid system (e.g. by providing loans to a "desperate South African government"), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because "aiding and abetting" human rights violations – the gravamen of the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid "for the purpose of facilitating the commissions of a . . . crime." This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one "gives substantial assistance or encouragement" to another's actions which he "knows" to "constitute a breach of duty." While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic

victory: “[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial.”

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs “effectively out of court” so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, it is view, the American plaintiff was entitled to “a presumption in favor of its chosen forum”). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was “effectively out of court” by the imposition of the stay. The Court held that that plaintiff:

> *“has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order . . . : “The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity).” . . . Those important differences do not, however, affect the extent to which a plaintiff is placed “effectively out of court,” which is the measure that defines our appellate jurisdiction over stay orders.”*

On the merits, the court vacated the stay as improvident because "there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to participate in those proceedings." The court did not consider the merits of the European plaintiff's appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in *Exxon Shipping Co., et al., v. Baker, et al*. (07-219). This case concerns a $2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska's Prince William Sound in 1989. In agreeing to hear Exxon's appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern, this specific award is too high because it is said to be "larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history." The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.